In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1492

JORGEN D. BERING AND WINIFRED E. BERING,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the Tax Court (Pet. App. iv-xii) and its further orders and memorandum (Pet. App. xiii-xvii) are not reported. The opinion of the court of appeals (Pet. App. xviii-xxi) is reported at 437 F. 2d 46.

JURISDICTION

The judgment of the court of appeals was entered on December 21, 1970. A petition for rehearing was denied on January 13, 1971 (Pet. App. xxii). The petition for a writ of certiorari was filed on March 19, 1971. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Whether petitioner [1] failed to receive at least 80 percent of the gross income from his patented valve seat invention during 1963, so that he did not qualify for the income-averaging benefits available under the original version of Section 1302 of the Internal Revenue Code of 1954.

STATUTE INVOLVED

Section 1302 of the Internal Revenue Code of 1954, as in force during 1963, is set forth in the Appendix to the petition (pp. i-ii).

STATEMENT

Petitioner is an industrial engineer and an inventor who in 1959 obtained a patent on a valve seat design. During that year and 1960, he was unable to interest others in manufacturing his valves on a royalty basis. Consequently, in order to exploit his invention, petitioner engaged various machine shops to manufacture valve parts, assembled the parts himself and sold the assembled valves. His small-scale operations during 1959, 1960 and 1961 resulted in a loss each year. (Pet. App. v-vi.)

Late in 1961, the two largest makers of milk filling

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[1] References to petitioner are to Jorgen D. Bering. Winifred E. Bering is a party hereto only because she filed a joint income tax return with her husband.

equipment in the United States adopted petitioner's float valves in their milk filling equipment. Although these companies were able to manufacture petitioner's valves, they expressed no interest in doing so on a royalty basis. Because of the suddenly increased demand for his valves, petitioner began to manufacture the valves himself. Not until 1963, however, did petitioner first earn a substantial profit. (Pet. App. vi.)

In reporting his income for 1963, petitioner claimed the income-spreading benefits of Section 1302 of the Internal Revenue Code of 1954. As it applied to taxable years ending prior to 1964, Section 1302 allowed individuals to treat the gross income received from a patented invention as though it had been received ratably over the entire income-producing period if certain conditions were met. Among these was the requirement that the gross income received "in respect of the invention" for the taxable year constitute at least 80 percent of the total gross income received from the beginning of the income-producing period through the twelve months immediately succeeding the close of the taxable year.

Petitioner attempted to demonstrate his qualification for Section 1302 treatment by computing his income "in respect of the invention" by deducting from total gross income for 1959 through 1964 the cost plus 10 percent of cost of manufacturing and sales activities during those years. These computations resulted in an amount of "invention income" for 1963 in excess of the required 80 percent for the entire period. However, the number of valves sold during 1963 was only 42.47

percent of the total number of valves sold from 1959 through 1964, and the gross receipts and net income for 1963 were only 56.77 percent and 78.94 percent, respectively, of the gross receipts and net income for the entire period. (Pet. App. vii-viii.)

The Tax Court ruled that petitioner had failed to establish his qualification under the 80 percent test (Pet. App. xi-xii). The court of appeals affirmed. It held that petitioner's method of allocating the total income between "invention income" and "business income" was unacceptable because it erroneously combined with income "in respect of the invention" all other income arising from petitioner's-entrepreneurial skills in exploiting the invention in excess of 110 percent of the costs of manufacture and sale. (Pet. App. xx-xxi.)

ARGUMENT

The decision below is correct. There is conflict or other reason for further review.

1. Petitioner does not assert conflict with any other decision, and we know of no conflict. Moreover, the income averaging provisions of the Code were substantially amended in 1964, so that the instant decision raises no question of continuing importance. See Sections 1301-1305 of the Code, as amended by Section 232 of the Revenue Act of 1964, P.L. 88-272, 78 Stat. 105.

2. There is no merit to petitioner's contention (Pet. 9-12) that he has been treated unfairly by facing at each stage of review of his claim a different rationale for rejection. The Commissioner, the Tax Court and

the court of appeals each determined that petitioner failed to qualify under Section 1302 because his proposed formula did not result in an income figure that reflected a return for the creative process alone.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JOHNNIE M. WALTERS,
Assistant Attorney General.

ELMER J. KELSEY,
PAUL M. GINSBURG,
Attorneys.

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